HIGH COURT OF UTTARANCHAL AT NAINITAL

(Court's order whether the case is or not approved for reporting.)

(Chapter VIII Rule 32 (2)(b)

Description of the case.

W.P. No. 673/2002 of M/S

Sri Rana Pratap Singh

vs

Smt. Kanaklata and
others.

Approved for reporting

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~~Not Approved for Reporting~~

Date of decision 29.9.2004

Initial of Judge

IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL.

WRIT PETITION NO. 673 (M/S) OF 2002

Sri Rana Pratap Singh ..... Petitioner.

Vs.

Smt. Kanaklata and others ..... Respondents.

.....

Date of Delivery: 29.09.2004

Hon'ble Rajesh Tandon, J.

Heard Sh. B.C. Pandey Senior Advocate and Sh. Manoj Tiwari for the respondent No. 1

By the present writ petition, the petitioner has prayed for quashing the order passed by the Court below by which the amendment has been allowed in the written statement.

Factual Aspects Of The Case:

Briefly stated the facts giving rise to the present writ petition are that the petitioner has filed a civil suit no. 7 of 1999 in the Court of Additional Chief Judicial Magistrate praying for a divorce against the respondent no.1.

The respondent no.1 has filed a written statement on 03.02.2001. Petitioner has submitted that after filing the written statement the respondent no.1 has also lodged a F.I.R. against the petitioner on 18.1.1999 being in Criminal Case no. 2373 of 1999 under section 498A Cr.P.C.

During the pendency of the suit the respondent no.1 has filed the application for amendment on 4.11.2001. The petitioner has filed objections against the proposed amendment. The respondent no1 has proposed paragraph no. 39, the same is quoted below:

"महोदय,

निवेदन है कि उपरोक्त वाद में कुछ वाकयात प्रतिवादीनी द्वारा दर्ज करने से रह गये है, जो कि प्रतिवादीनी लोक लाज के कारण पूर्व में अपने प्रार्थना पत्रमें कह नही पाई थी। निम्नलिखित तथ्यों को प्रतिवाद पत्र में बजरिये संशोधन कर बढाया न्यायहित में अतिआवश्यक है।

अतः श्रीमान जी से प्रार्थना है कि जाबाबदावे में निम्न तथ्य बढ़ायें जाने के आदेश पारित करने की कृपा की जायें।

यह कि जबाब के पैरा नं0 30 के आगे पैरा नं0 39 निम्न प्रकार बढ़ाया जावे –

"39– यह कि वादी राण प्रताप के अवैध सबंध कु0 मनोरमा पुत्री बीरबहादुर जिसकी उम्र करीब 28 वर्ष है के साथ चले आ रहे है। प्रतिवादी ने विवाह के उपरांत आपत्तिजनक स्थिति में वादी तथा कु0 मनोरमा को कई मर्तबा देखा है। जब प्रतिवादिनी ने इस बात का विरोध किया ता वादी व उसके परिवारवाले क्षुब्ध हो गये। कु0 मनोरमा व उसके माता पिता ने वादी को अपने जाल में फंसा रखा है तथा जब तक प्रतिवादिनी अपने ससुराल में रही वादी के कु0 मनोरमा के साथ अवैध सम्बंध कायम रहे और अब भी है। उक्त कुण्ठा के कारण ही प्रतिवादिनी को वादी व उसके परिवारवालों ने परेशान करना शुरू कर दिया तथा दहेज इत्यादी के कारण तंग व परेशान करना शुरू कर दिया। प्रतिवादिनी ने इसी कारण वादी से कु0 मनोरमा की संगत छोड़ने को कहा तथा प्रतिवादिनी के साथ अलग रहने की बात कही लेकिन वादी अपने भाई व भाभी एवं मनोरमा के दबाव के कारण प्रतिवादी के साथ वैवाहिक जीवन व्यतीत करने को तैयार नहीं हुआ जब कि प्रतिवादिनी अब भी वादी के साथ वैवाहिक जीवन व्यतीत करने को तैयार है। वादी का उद्देश्य प्रतिवादी से विवाह रचाकर एकमात्र दहेज प्राप्त करना था। तथा प्रतिवादिनी व उसके परिवार वालों के उत्पीड़न का था।'

"यह कि वादी तथा उसके बडे भाई ,भाभी, मनोरमा विरूध पर धारा 498 ता0 हि0 का मुकदमा विचाराधीन ह"

Counsel for the petitioner Sri B. C. Pande, Senior Advocate has submitted that the impugned order allowing

the amendment is wholly illegal in as much as the amendment is:

(1) scandalous and the nature of the same is hit by the provision of Order 6 Rule 16 of the Code of Civil Procedure;
(2) it will change the nature of the proceedings
(3) it will cause of action, and
(4) the allegations by way of amendment have been made against someone who is not a party to the proceedings of the suit.

Counsel for the petitioner has submitted that the suit has been filed on the ground of cruelty alone when in point of fact by the present amendment, a different cause of action is sought to be impleadment i.e. adultery and as such the amendment will change the nature of suit and further allowing the amendment will also amount to withdrawing his own defence as, neither any such averments have been made in the plaint nor in the written statement by the parties.

Legal Submissions

So far as the first point is concerned, Order 6 Rule 16 provides as under:

> **"16. Striking out pleadings**_ The Court may at any stage of the proceedings order to be struck out or amended any matter in any pleading-
>
> (a) which may be unnecessary, scandalous, frivolous or vexatious, or
> (b) which may be tend to prejueice, embarrasses or delay the fair trial of the suit or
> (c) which is otherwise an abuse of the process of the Court.

So far as the change of cause of action is concerned, Order 6 Rule 17 reads as under:

> **"17. Amendment of pleadings-** The trial Court may at any stage of the proceedings allow either party to alter or amend his pleading in such manner as on such terms as may be just and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties:
>
> Provided that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial."

In view of the law laid down by the apex Court in 1998(I) A.R.C. page 1 as under:

> "Even that apart, the said decision of two learned Judges of this runs counter to a decision of a Bench of three learned Judges of this Court in the case of Modi Spinning & Weaving Mills Co. Ltd. and another Vs. Ladha Ram and Co. (1977) 1 SCR 728. In that case Ray, C.J., speaking for the Bench had to consider the question whether the defendant can be allowed to amend his written statement by taking an inconsistent plea as compared to the earlier plea which contained an admission in favour of the plaintiff. It was held that such an inconsistent plea which would displace the plaintiff completely from the admissions made by the defendants in the written statement cannot be allowed. If such amendments are allowed in written statement plaintiff will be irretrievably prejudiced by being denied the opportunity extracting the admission from the defendants……."
>
> "Consequently, it must be held that which the amendment sought in the written statement was of such a nature as to displace the plaintiff's case, it could not be allowed as ruled by a three member Bench of this Court. This aspect was unfortunately not considered by latter Bench of two learned Judges and to the extent to which the latter decision took a

contrary view qua such admission in written statement, it must be held that it was *per incuriam* being rendered without being given an opportunity to consider the binding decision of a three member Bench of this Court taking a diametrically opposite view."

In 1991 (Supp.) A.W.C. page 504 it has been held as under:

"It is settled that amendment necessary for the purpose of determining the real questions in controversy can be allowed. No amendment should be allowed merely because the other side can be compensated by costs. Where a party has been unsuccessful on a plea, a new plea by him cannot, in my opinion, be said to be necessary for the purpose of determining the real question in controversy. It is incumbent upon the Court to see that the amendment besides being necessary for the purpose of determining the real matter in controversy, must not cause injustice to the other side. Under the cover of seeking amendment it is not open to any party to substitute a new cause of action or to change the nature of the suit or to substitute the subject-matter of the suit except when the Court thinks it just and necessary. No attempt whatsoever was made before me to assail the findings of the Court below that the proposed amendment did not have the effect of changing the nature of the suit and cause of action. As already stated, the amendment is prima facie distinct independent of the original relief asked forthcoming in the instant case. There is a categorical finding in the impugned order that the consequential relief and the set of new facts proposed to be added in paras 6C and 6D and the will dated 15.06.1980 and gift deed dated 23.5.1959, came to the knowledge of the plaintiff-petitioners in the year 1980. This is clearly borne out from paragraph 7 of the proposed amendment. The Court further held that the said relief for cancellation was barred as no such suit was filed within three years from the date of the knowledge. A valuable right has accrued in favour of the defendants, and the plaintiffs cannot be permitted to add the proposed amendments to the prejudice of the defendants-respondents which was going to cause irreparable injury and injustice to them. These findings were not questioned before me inasmuch as no arguments were addressed on these aspects. A new case based upon the facts which were

available to the plaintiffs at the time of the original plaint and which were not added in the original plaint. Cannot be permitted to be set up by way of amendment. Again were a fresh suit on an amended plaint would be barred by limitation, the court below is right in its view that the injury cannot be compensated by costs and the amendment in such circumstances deserves to be refused. Learned counsel for the petitioners failed to substantiate the plea that for the decision of the questions sought by the amendment new facts, evidenced and investigation thereof were not required. There is also nothing to indicate that the petitioners had no knowledge of the facts which are now sought to be added. The amendment was refused by the Court below for more than one reason as already stated earlier and the view taken by the court below, in my opinion, cannot be assailed on the ground of any legal infirmity. On the contrary, the order passed by the court below was just and proper."

In 1992 (1) A.R.C. 393- Chandra Bhushan Singh Vs. Vth Additional District Judge, Azamgarh and others, it has been held as under:

"Having considered the submissions made by the learned counsel for the petitioner, I do not agree with him that the proposed amendment will not change the nature of the suit and that the amendment is only trivial and on the principle of "liberal view" the amendment ought to have been allowed. It has also been held by the court in revision that allowing or rejecting the amendment will not prejudice the case of the defence. Keeping in view, the aforesaid findings recorded by both the Courts below, in my opinion, it is not a case in which the principle of adopting a liberal view to allow the amendment in the present case is applicable. To my mind, the petitioner has not succeeded in making out a case for interference under Article 226 of the Constitution of India in the impugned orders passed by the Court below.

In view of the law laid down in the case of M/s Industrial Rubber and Latex Manufacturers, Dehradun and another reported in 1989 (1)654, it has been held as under:

"8……The main contention of the learned counsel for the applicant is that the amendment sought did not

change the nature of the case nor, in any way caused any prejudice to the plaintiff. In my opinion, this submission is misconceived. In a case reported in AIR 1978 SC, 798 Mohd. Ishaq Vs. Mohd. Iqbal, it was observed:

'the amendment of written statement sought in appeal was on such facts which, if permitted to be introduced, would have completely changed the nature of the original defence. It would have brought about an entirely new plea which was never taken up either at the time of original pleadings. The additional evidence sought to be adduced was in respect of the facts stated in the amendment petition. Held that the Court court in appeal rightly rejected all the petition for amending the written statement and adducing additional evidence. .....

It has been held in AIR 1968 SC pg. 1165 that suit has to be tried on the original cause of action alone. The observations are quoted below:

"Now it is a fixed principle of law that a suit must be tried on the original cause of action and this principle governs not only the trial of the suits but also appeals."

In Atma Ram Mittal VS.Ishwar Singh Punia 1988 (2) 557, it has been held as under:-

" In our opinion , bearing in mind the well settle principles that the right of the parties crystallize to the date of the Institution of the suit as enunciated by this Court in Om Prakash Gupta Vs. Dig. Vigendrapal Gupra (Supra), the meaningful construction must be that the exemption would apply for a period of ten years and will continue to be available until suit is disposed of or adjudicate. Such suit or proceedings must be instituted within the stipulated period of ten years. Once rights crystalise the adjudication must be in accordance with law."

In Gurdial Singh and others Vs. Raj Kumar and others reported in (2002) 2 S.C.C. 445, it has been held that the amendment will be allowed only when it is necessary to determine the real question in controversy between the

parties. The observations of the Apex Court are quoted as under:

> "When one of the parties has been permitted to amend his pleadings, an opportunity has to be given to the opposite party to amend his pleadings. The opposite party shall also have to make an application under Order 6 Rule 17 CPC which, of course, would ordinarily and liberally be allowed. Such amendments are known as consequential amendments. The phrase "consequential amendment" finds mention in the decision of this Court in Bikram Singh Vs. Ram Baboo. The expression is judicially recognized. While granting leave to amend a pleading by way of consequential amendment, the Court shall see that the plea sought to be introduced is by way of an answer to the plea previously permitted to be incorporated any way of an amendment by the opposite party. A new plea cannot be permitted to be added in the grab of a consequential amendment, though it can be applied by way of an independent or primary amendment.
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> 20. Some of the High Courts permit, as a matter of practice, an additional pleading, by way of response to the amendment made in the pleadings by the opposite party, being filed with the leave of the Court. Where it is permissible to do so, care has to be taken to see that the additional pleading is confined to an answer to the amendment made by the opposite party and is not misused for the purpose of setting up altogether new pleas springing a surprise on the opposite party and the Court. A reference to order 6 Rule 7 CPC is apposite which provides that no pleadings shall, except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading the same."

Relying upon the judgments of the Apex Court in G. Nagamma and Anr. Vs. Siromanamma and anr (1996)2 SCC 25, B.K.Narayana Pillai Vs. Parmeshwaran Pillai and Anr., (2000) (1) SCC 712, Arjun Singh Vs. Mohindra Kumar and Ors, AIR 1964 SC 993, Municipal Corporation of Greater Bombay Vs. Lala Pancham and ors. AIR 1965 SC 1008, Jagdish Singh Vs. Natthu Singh AIR 1992 SC 1604, Gopal Krishnamurthi Vs. Sheerdhara Rao AIR 1950 Mad 32, Gauri

Shankar Vs. M/s Hindustan Trust (P)Ltd. AIR 1972 SC 2091, Radha Devi Vs. Bajrangi Singh AIR 1996 SC 2358 and Dondapati Narayana Reddy Vs. Duggireddy Venkatanarayana Reddy (2001) 8 SCC 115, G.Nagamma and Ors. Vs. Siromanamma and another, JT 1998 (4) SC, 484, Vineet Kumar Vs. Mangal Sain Wadhera AIR 1985 SC 817, Fritiz T.M.Clement and anr. Vs. Sudhakaran Nadar and another (2002) 3 SCC 605, Gurdial Singh VS. Raj Kumar Aneja (2002) 2 SCC 445,1 Om Prakash Gupta Vs. Ranbir B. Goyal (2002) 2 SCC 256, Munni Lal Vs. Oriental Fire and General Insurance Co. Ltd AIR 1996 SC 642, Smt. Ganga Bai Vs, Vijay Kumar AIR 1974 SC 1126, M/s Ganesh Trading Co. Vs. Maoji Ram AIR 1978 SC 484, Estrella Rubber Vs. Dass Estate Pvt. Ltd., (2001) 8 SCC 97, Siddalingamma and Anr. Vs. Mamdha Shenoy (2001) 8 SCC 561: 2002 SCFRBC 17, Raghu Thilak D. John Vs. S.Rayappa and Ors., AIR 2001 SC 699, Jayanti Roy Vs. Dass Estate Pvt. Ltd. AIR 2002 SC 2394, Sampat Kumar Vs. Ayyakannu and another (2002) 7 SCC 559, Nagappa Vs. Gurudayal Singh and others (2003)2 SCC 274, and Hanuwant Singh Rawat Vs. M/s Rajputana Automobiles, Ajmer (1993) 1 WLC 625, it has been held in the case of Devendra Mohan Vs. State of U.P. reported in 2004 (1) ARC 504 that the amendment of the pleadings ordinarily cannot be allowed so as to completely alter the nature of the suit. It has been held as under:

> "The amendment is not permissible if the very basic structure of the plaint if changed or the amendment itself is not bona fide. In case the facts were in the knowledge of the party at the time of presenting the pleadings, unless satisfactory explanation is furnished for not introducing those pleadings at the initial stage, the amendment should not be allowed. Amendment should also not be

permitted where it withdraws the admission of the party or the amendment sought is not necessary to determined the real controversy involved in the case."

Conclusion

Admittedly the suit was filed for dissolution of marriage of plaintiff Rana Pratap (petitioner) with the respondent Smt. Kanaklata and now the amendment is being sought by making averments that the plaintiff/petitioner has illegal relations with one Km.Manorama. Such a plea is barred by the provisions of Order 6 Rule 16 as it will change the original cause of action and cannot be allowed by way of amendment.

So far as the amendment in paragraph 39 of the written statement is concerned, certainly is being a different cause of action, the respondent no.1 can be allowed to plead by way of counter-claim alone and not by way of amendment.

Writ petition is allowed. A writ of certiorari is issued quashing the orders contained in Annexure 5 and 7 to the writ petition.

No order as to costs.

September 29,2004. **(Rajesh Tandon, J.)**

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